

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

AMERICAN PAPER BAG, LLC

Employer

and

Case 04-RC-263126

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 401¹**

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The sole litigable issue in this case is whether the petitioned-for unit is appropriate under the Board's traditional community-of-interest standard, or instead whether the smallest appropriate unit must include additional employees. American Paper Bag, LLC (the Employer) is engaged in the manufacture of paper bags at its Sugar Notch, Pennsylvania facility, the only facility involved herein. International Brotherhood of Teamsters Local 401 (Petitioner) seeks to represent a unit consisting of approximately 11 packers and one forklift operator employed by the Employer at its Sugar Notch facility. The Employer contests the appropriateness of the petitioned-for unit on the grounds that the smallest appropriate unit must also include six operators who work at the same facility, because the packers and forklift operator do not share a community of interest meaningfully distinct from the interests of the operators so as to permit a separate unit.

An additional issue in this case is whether, in light of the ongoing COVID-19 pandemic², the election in this matter should be conducted manually or by mail. Both Petitioner and the Employer urge for the direction of a manual election at the Employer's facility, with the stipulation that the election should be converted to mail ballot if two or more employees contract COVID-19 or are quarantined due to potential exposure to the virus.

A hearing in this matter was held by videoconference before a Hearing Officer of the Board on August 11, 2020³, during which the parties entered into several stipulations, presented evidence, and stated their respective positions on both issues. Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Acting Regional Director, the parties were permitted to present their positions as to the mechanics of this election at the hearing. Additionally, the parties were permitted to file post-hearing briefs.

¹ The correct legal names of the Employer and Petitioner appear in this decision as stipulated by the parties.

² Throughout this decision, the terms "COVID-19," "COVID," and "Coronavirus" are used interchangeably.

³ Herein, all dates occurred in 2020 unless otherwise noted.

Having reviewed the stipulations, evidence, and arguments presented by the parties as well as applicable legal precedent, I find, in agreement with the Employer, that the smallest appropriate unit must also include the six operators that work alongside the packers and forklift operator, as the packers and forklift operator do not share a community of interest sufficiently distinct from the interests of the six operators to permit a separate unit. In addition, after careful review and consideration of the parties' positions regarding the mechanics of the election, I find that a prompt mail-ballot election is appropriate given the extraordinary circumstances presented by the continuing COVID-19 pandemic.

I. THE APPROPRIATENESS OF THE PETITIONED-FOR UNIT

a. Factual Overview

i. The Employer's operation

The Employer is a start-up paper bag manufacturing company that began operations in 2016. It was founded by Ian Robson, the Employer's Vice-President of Manufacturing. The record reflects that Robson and Jeffrey Russ, who is referred to in the record as an Owner of the Employer, are statutory supervisors within the meaning of Section 2(11) of the National Labor Relations Act (Act). The Employer has exclusive rights to a brand new type of paper bag machine that allows the Employer to manufacture a unique style of paper bag that is very different from other paper bags being made in North America. Currently, the Employer has two operational paper bag machines at its facility, as well as one printing machine. In total, the Employer has 22 employees.

ii. Packers, forklift operator, and operators

At the present time, the Employer's operation consists of one production department⁴ comprised of three classifications of production employees: operators⁵, packers, and one forklift operator. The record reflects that all three classifications are supervised by both Robson and Russ.

Operators are responsible for running the bag machines. The bag machines are loaded with a very large roll of either printed or unprinted paper. The paper is fed into the machine where it is

⁴ There is general testimonial evidence that the Employer intends to expand its operations such that there will be additional hiring, the creation of additional departments, and the addition of more machines. The Employer has not, however, raised as an issue in this proceeding that the instant petition is premature because the Employer does not presently employ a substantial and representative complement of its future workforce. Accordingly, while this decision references the Employer's intended expansion as background evidence, this decision will not address whether that expansion impacts the propriety of the instant petition.

⁵ The term "operator" as used in this decision refers to the employees who run the bag manufacturing machines. It does not include the forklift operator.

glued, folded, and cut before it exits the machine as a final product. The bags are produced according to exact customer specifications. Throughout this process, the operator monitors the machine, watches a screen attached to the machine, checks to make sure the roll of paper is not too low and that the machine has an adequate supply of glue, and generally ensures that the machine is running smoothly and producing quality product. Operators control the speed of the machine and the number of bags it produces at any given time, with goals of producing 150 to 180 bags per minute. Those goals are set by either Robson or Russ. Operators are expected to troubleshoot and fix any problems that may arise with the machine. Operators are not required to possess specific qualifications or licenses; however, operating a machine is regarded as a position requiring more knowledge, skill, and training than that of a packer.

After the bag machines produce finished bags, those bags exit the machine on a conveyor. Two packers are stationed at the conveyor, one on each side. As the bags emerge onto the conveyor, the packers gather the bags and put them into a pre-assembled box that will ultimately be shipped to the customer. Once a box is filled, the packer closes and seals the box, and then places the box onto a pallet. In addition to these duties, packers are also tasked with assembling the boxes prior to the finished product being placed in them for shipment.

As the name suggests, the forklift operator's primary responsibility is operating the forklift and moving pallets that are ready for shipment from the production area to the shipping area. In addition to his primary duties, the forklift operator is also tasked with running the warehouse operations at the facility. The forklift operator is required to have a special certification and licensing. Robson is also certified to drive the forklift, and he assists with operating the forklift when the regular forklift operator is unavailable. Additionally, there is one operator who is certified and licensed to operate the forklift.

iii. Integration of the Employer's operation and interchange of employees.

The Employer's operation naturally leads to frequent contact among the three classifications. One operator and two packers work at the same machine during a shift, and work within 20 feet of one another, often closer. In order to ensure that the product meets customer specifications and expectations, the operator must inspect the finished bags as they exit the machine, and often work alongside the packers to verify the quality of the product. An operator may also assist with packing duties if the packers get behind and bags are beginning to accumulate. Moreover, if a packer notices an issue with the product, the packer must inform the operator of the problem so the operator can troubleshoot and fix the issue. Also, when packers take one of their three breaks throughout the day—one morning 15-minute break, one 30-minute lunch break, and one 15-minute afternoon break—the operator running that machine fills in for the packer. This occurs daily. One operator testified that he performs packing work for one-and-a-half to two hours per shift.

Packers also assist operators. The record reflects that packers have helped operators level the machine, change rolls of paper, and clean out the glue in the machine at the end of each day. According to Robson, most packers have assisted operators with these tasks, although packers are

not required to do so. Robson testified that this type of assistance occurs daily. One packer testified that although packers do assist with these tasks on machines, the amount of assistance has varied in the last few months: whereas prior to July, packers assisted operators frequently, since July, the assistance has been much less.

According to Robson, the forklift operator assists with packing duties when there is not enough forklift work to occupy him. For example, the forklift driver recently spent time vacuuming out debris from one of the bag machines to ensure proper performance of the machine. Moreover, as referenced above, there is one operator who is licensed and qualified to drive the forklift, and that operator performs forklift work on a weekly basis, often on the weekends when the regular forklift operator is not scheduled to work. Additionally, one packer is being trained to operate the forklift, although he does not possess the requisite licenses or certifications to run the forklift by himself.

The Employer operates what it calls a Panama shift. Most operators and packers work 12-hour shifts, from 6 a.m. to 6 p.m. One week they will work Tuesday and Wednesday, will be off Thursday and Friday, and then will return to work Saturday through Monday. The following week they will work the reverse schedule. Thus, most packers and operators work the same shifts—a necessity because they work alongside each other on the same machines. One packer, however, only works Tuesday through Friday, and does not work weekends. In addition, the forklift operator works Monday through Friday, so he also does not work weekends.

iv. Packers, forklift operator, and operators' terms and conditions of employment.

Aside from a difference in wage rates, many of the terms and conditions of employment shared by the three classifications are the same. Operators are paid \$23 per hour⁶, the forklift operator is paid \$18 per hour, packers are paid \$16 per hour, and all are eligible for overtime. All three classifications have access to the same insurance and vacation benefits. The Employer supplies employees with free food such as granola bars and ice pops, and all three classifications have equal access to that food. The Employer provides all employees with a \$50 boot allowance. Employees are not required to wear a specific uniform; however all three classifications are required to wear steel-toed boots, a t-shirt that is in good condition, and either jeans or shorts during the summer.

Packers, forklift operators, and operators all use the same break room, and all have access to the same bathrooms. As discussed above, each employee is entitled to two 15-minute breaks and one 30-minute lunch break during a shift. According to Robson, break times are typically

⁶ Operator Ray Hodge is paid \$24 per hour; he is the only operator that makes more than \$23 per hour. The record reflects that Hodge, pursuant to an agreement in place with the Employer, is provided rent-free housing in an apartment rented by the Employer. The apartment was initially rented to house three employees, including Hodge, when the Employer first began operations. However, the other two employees no longer work for the Employer, and Hodge is the only employee living in the apartment. No other employee is provided the same benefit.

coordinated at times when the machine is down, for instance if the reel needs to be changed, or when it is in full production such that the operator is able to step away from the machine to cover the packing duties of a packer on break.

The record largely reflects that operators inform the packers when breaks should be taken based on where the machine is in its production cycle. One packer testified that operators will sometimes tell packers when they can take a break, and on other occasions, there is an informal schedule used by that packer and the crew she is working with concerning when breaks should be taken. A second operator testified that she may decide when to take a break, and that breaks are routinely taken around the same time each day. A third packer testified that he does not decide when to take a break. Instead, he is told by an operator when he can take a break, although it usually occurs when the machine is down. Further, an operator testified that when running his machine, breaks are coordinated based on where the machine is in production, and he focuses on making sure the packers can take their breaks and lunches before he takes his own breaks.

b. Position of the Parties

The Employer argues that the petitioned-for unit is inappropriate because the smallest appropriate unit must include the operators. In support, the Employer contends that packers, forklift drivers, and operators are organized into one department, share common supervision, have significant contact with one another, are functionally integrated, and have nearly identical terms and conditions of employment, except for wages. According to the Employer, the record establishes conclusively that the three classifications work hand in hand during the paper bag production process, and each classification will assist the others in performance of that classification's work. As a result, the Employer disputes that the packers and forklift driver share a community of interest sufficiently distinct from the interests of the operators to permit their own separate unit.

Conversely, Petitioner argues that operators must be excluded from the petitioned-for unit. In support, Petitioner cites to record evidence that operators earn significantly more per hour than packers or the forklift driver. Additionally, Petitioner relies on the operator's control of the machine, and thus the control of the number of bags being made per minute, in arguing that operators have supervisory-like duties. In that same regard, Petitioner contends that operators control when packers are permitted to take their breaks. Further, according to Petitioner, while there is some evidence of interchange between positions, packers cannot perform the work of the operators, and thus there is no overlap between the positions. Lastly, Petitioner argues that operators are significantly more qualified than packers, are more extensively trained, and are expected to enforce safety procedures and protocols, and that the position requires distinct skills and experience that packers do not possess.

c. Board Law

Petitioner is not required to seek a bargaining unit that is the only appropriate unit or even the most appropriate unit. The Act merely requires that the unit sought by Petitioner be *an* appropriate unit. *Wheeling Island Gaming*, 355 NLRB 637, fn. 2 (2010), citing *Overnite Transp. Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). “The Board’s inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends.” *The Boeing Company*, 368 NLRB No. 67, slip op. at 3 (2019).

In *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), the Board returned to the traditional community-of-interest standards for determining whether a unit is appropriate. There, the Board specifically found that the traditional community-of-interest test is the “correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees.” *Id.*, slip op. at 1. In each case, the Board is required to determine:

whether the employees are organized into a separate departments; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., slip op. at 11, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002). The Board must analyze “whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from the unit to warrant a separate bargaining unit.” *Ibid.* (emphasis in original)

The Board has clarified that the traditional community-of-interest test, as articulated in *PCC Structural*, involves a three-step analysis.

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.

The Boeing Company, *supra*, slip op. at 3. With respect to the first step, “the traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for-employees are too disparate to form a community of interest within the petitioned-for unit.” *Ibid.*, citing *Saks & Co.*, 204 NLRB 24, 25 (1973); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004). In step two of the analysis, “the Board must determine whether the employees excluded from the unit ‘have meaningfully distinct interests in the context of collective-bargaining that *outweigh* similarities with unit members.’” *The Boeing Company*, *supra*, slip op. at 4, quoting *PCC Structural*, *supra*, slip op. at 11. “[W]hat is required is that the Board analyze the distinct

and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit.” *Ibid.*

d. Application of Board Law to the Facts

Applying the Board’s traditional community-of-interest test, I find, for the following reasons, that the packers and forklift operator do not share a community of interest sufficiently distinct from the interests of the operators to permit their own separate unit. Accordingly, I find that the smallest appropriate unit in this case must include the operator classification.

i. Step one of the Board’s analysis: shared interests within the petitioned-for unit.

To begin, I find that the packers and the forklift operator share an internal community of interest as required by step one of the Board’s analysis. Packers and forklift operators are currently organized within the same department, and they share common supervision. While the forklift operator possesses skills, training, and job functions that are distinct from packers, I find that any distinction between the classifications’ skills, training, and functions is outweighed by the extensive contact and integration between the employees. Both classifications work closely together in the same paper bag production process. Packers are responsible for boxing the finished bags, sealing the boxes for shipment, and arranging the sealed boxes on pallets. The forklift driver then transports the pallets to the shipping area. As such, there is evidence of frequent contact between the packers and the forklift operator and a high degree of functional integration. Lastly, the two classifications share nearly identical terms and conditions of employment, aside from the forklift driver making \$2 per hour more than packers.

Based on the above, I find that the packers and forklift operator share an internal community of interest.

ii. Step two of the Board’s analysis: shared interests between the petitioned-for unit and the operators.

For many of the reasons cited above in step one of the Board’s analysis, I find that the petitioned-for unit does not share a community of interest sufficiently distinct in the context of collective bargaining from the interests of the operators to justify the operators’ exclusion.

a) Common departmental organization and common supervision.

The record clearly reflects that packers, operators, and the forklift operator are organized within the same department. The record is equally clear that all three classifications are collectively supervised by either Robson or Russ. Accordingly, I find that these two factors weigh in favor of finding that the three classifications share a general community of interest.

b) Distinct skills and training.

While operators are not required to possess specific licenses or certifications in order to operate a bag machine, there is significant evidence that operation of the bag machines requires distinct skills, training, and experience that the packer position does not. Operators must be adept at changing paper rolls, understanding the machine's glue levels, and understanding the processes involved with manufacturing paper bags. Operators must also be able to troubleshoot issues with the machines and are required to perform maintenance when needed. On the other hand, the packer position consists of removing the finished paper bags from the machine conveyor and placing them inside a box for shipment. Thus, there exists a significant difference in the level of skill and training needed to perform the two positions.

Additionally, the forklift operator is required to have specific licenses and certifications that neither the packers nor operators are required to possess. Only two production employees have the necessary certifications and licenses to operate the forklift, thus underscoring the distinct nature of the skills and training necessary to run that piece of equipment.

Based on the distinct differences of skills and training necessary between the packers and forklift operator and operators, I find this factor weighs against inclusion of the operators in the petitioned-for unit.

c) Distinct job functions.

As described in detail above, the three classifications each play a distinct role in the paper bag production process. Operators are largely tasked with operating the machines that manufacture the paper bags. Packers are primarily responsible for packing the finished product into boxes for shipment. And the forklift operator is required to transport pallets away from the production area to ready them for shipment, as well as maintain the warehouse.

However, there is clear evidence that operators perform packing functions daily. Indeed, one operator testified that he spends as much as two hours of his 12-hour day—approximately 17 percent—performing packing work, evidence that the petitioned-for unit is not sufficiently distinct from the operators. See *Brand Precision Services*, 313 NLRB 657, 658 (1994) (finding inappropriate the petitioned-for unit in part because the excluded employees did 10 percent of the same work as the included employees); *The Boeing Company*, supra, slip op. at 5 (an overlap in 14 percent of the work performed by excluded and included employees supports a finding of insufficiently distinct community of interest between the excluded and included employees). Moreover, the record contains evidence that packers as well as the forklift operator perform certain maintenance-related tasks on machines in an effort to aid the operators, and one operator is also required to operate the forklift when the regular forklift operator is absent from work.

Even if most of the operators do not run the forklift, and the packers do not actually run the machine, there is nevertheless evidence of an overlap in job functions between the classifications, particularly in the case of operators performing packing work. Thus, on balance, I

find that this factor supports including the operators within a unit of packers and the forklift operator.

d) Functional integration and employee contact.

There is little doubt as to the functional integration among the three classifications. Functional integration exists when employees in a unit sought by a union work on different phases of the same product or a single service as a group. *Arvey Corp.*, 170 NLRB 35 (1968); *Transerv Systems, Inc.*, 311 NLRB 766, 766 (1993). Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Ibid.*.

As the Board found relevant in *Boeing*, supra, all employees in the operator, packer, and forklift operator classifications work towards producing and shipping one single product—paper bags. Each is a cog in the entire process; without one, the operation would not exist. The operators work in close proximity with packers, communicating on a near-constant basis to ensure the quality of the product being produced. Operators will fill in for packers when packers are taking breaks. Moreover, packers assist with certain tasks related to the operation of the machine, like changing paper reels and cleaning out glue at the end of each shift. The forklift operator has also assisted in machine maintenance tasks, and there is evidence that at least one operator performs forklift work on the weekends. Furthermore, operators and packers must coordinate their breaks such that there is sufficient coverage at the machine to ensure efficient and uninterrupted production and packing of bags.⁷

Operators also assist in moving fully packed boxes to the pallets. From there, the forklift operator transports the boxes to the appropriate staging area to ready for shipment to the customer. There is also evidence that packers are trained, if they choose, on how to run machines, with at

⁷ At various points in the record, as well as in its post-hearing brief, Petitioner refers to the operators as having supervisory-like duties. Petitioner makes this point by relying on evidence that operators are paid higher wages, enforce safety rules, control the flow of bags through the machines thereby directing and controlling the work of the packers, and dictate when packers can take breaks. However, at no point has Petitioner explicitly stated the position that operators are supervisors as defined by Section 2(11) of the Act. In any event, I find that the record is devoid of any evidence that operators meet the statutory definition of a supervisor. There is no evidence that operators have the authority to engage in any of the employment actions described in Section 2(11) of the Act, nor do they have the authority to effectively recommend the same. There is no evidence that they have disciplined employees or recommended discipline in connection with enforcing safety rules. As far as coordinating breaks, the “determination of order of lunch and other breaks is essentially clerical.” *NLRB v. Hilliard Development Corp.*, 187 F.3d 133, 146 (1st Cir. 1999). Moreover, production schedules are determined by Robson and Russ, and the operators’ ability to control the speed of the machine is nothing more than following managerial directives. Thus, to the extent Petitioner argues that operators are statutory supervisors, I find that the record does not support such a determination.

least one packer being promoted to an operator position at the facility. There is also evidence that one packer is being, or has been, trained to operate the forklift.

Based on the foregoing, I find that these factors weigh in favor of finding that packers and the forklift operator do not share a community of interest meaningfully distinct from the interests of the operators.

e) Employee interchange.

There is also evidence of employee interchange in this case. When the forklift operator is absent from work, particularly on the weekends, one operator temporarily assumes that role. Moreover, there is some evidence on the record that one packer, at a time when there was an operator position opening, received some instruction and/or training on the operation of the machines in the hope that he would be promoted. In addition, as described in detail above, operators temporarily assume packer responsibilities on a daily basis for a substantial portion of each shift.

While not overwhelming, I find that the existence of some employee interchange between the classifications weighs in favor of finding that the classifications share an indistinct community of interest.

f) Distinct terms and conditions of employment.

Packers, operators, and the forklift operator share nearly identical terms and conditions of employment aside from their wage rates. They all receive the same insurance and vacation benefits, the same boot allowance, have the same access to Employer-provided food, and all receive overtime opportunities. Employees in all three classifications use the same break room, the same restrooms, have nearly the same schedules, and are subject to the same uniform policy and safety rules and procedures.

Even though the operators earn significantly higher wages than the packers, and somewhat higher than the forklift operator, that fact alone is not dispositive. See *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004) (finding that any distinct community of interest shared by the included employees on the basis of their earning higher wage rates was outweighed by the highly integrated nature of the workforce, the high degree of interaction and integration, and common supervision and other common terms and conditions of employment). Thus, I find that the lack of distinct terms and conditions of employment, aside from wages, among the three classifications weighs in favor of including the operators in an appropriate unit.⁸

⁸ I find unavailing Petitioner's argument that operator Ray Hodge does not share a community of interest with the other operators, or with the packers and the forklift operator. The record does reflect that Hodge makes \$1 more per hour than the other operators; however, he is the longest-tenured operator at the facility. Additionally, Hodge uses an Employer-provided apartment that the Employer initially rented for three employees who began with the Employer when it commenced operations in 2016. The Employer continues renting the apartment in part for

For the foregoing reasons, I find, on balance, that step two of the Board's analysis requires a determination that operators should be included in an appropriate unit with packers and the forklift operator.

iii. Step three of the Board's analysis: Board's decisions on similar units within the same industry.

The Board has not established a bright-line rule regarding the appropriateness of units within the paper bag production industry. However, an appropriate unit determination made in a related industry is instructive. In *Texas Color Printers, Inc.*, 210 NLRB 30, 30-31 (1974), the Board found inappropriate a petitioned-for shipping and receiving unit consisting of eight employees of an overall 108-employee production and maintenance workforce. The employer in that case was involved in the printing, collating, and bindery of catalogues, magazines and other commercial printing products, and the Board found that the shipping and receiving employees did not enjoy a sufficiently distinct community of interest from the overall production and maintenance unit because of the high degree of work contacts, temporary interchange, and overlapping supervisors. *Id.* at 31.

Accordingly, I find that step three of the Board's analysis supports a finding that the operators, who are part and parcel of the same operation as the packers and forklift operator, must be included in an appropriate unit.

For the foregoing reasons, I find that the employees in the petitioned-for unit do not share a community of interest sufficiently distinct in the context of collective bargaining from the interests of the operators to permit a separate unit. I find, then, that the smallest appropriate unit in this case must include the operators. Accordingly, I am directing an election in a unit that includes the packers, operators, and forklift operator.

II. TYPE OF ELECTION: MANUAL OR MAIL

a. Factual Overview

Hodge, but also to use when international contractors must visit the facility to install and perform work on the machines. While Hodge has access to a benefit that no other employee enjoys, I do not find that his use of the rent-free apartment precludes his eligibility in this unit. Hodge has frequent contact as an operator with the employees in the other classifications, enjoys other identical terms and conditions of employment, has common supervision and is organized in the same department, and frequently performs forklift work. Additionally, excluding Hodge from this unit would leave him alone in a single-person residual unit with no ability to exercise his Section 7 rights to representation, something that gives the Board significant pause. Accordingly, I find for the foregoing reasons, that Hodge is eligible to vote in this election.

i. *The COVID-19 Pandemic Generally.*

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been more than 5.7 million confirmed cases of COVID-19 in the United States, and over 176,000 deaths.⁹ The United States has experienced a roller coaster-like transmission rate, often experiencing a sharp uptick in confirmed cases after periods of lower transmission. From March 15 through April 12, the seven-day moving average of new confirmed cases spiked from 435 to nearly 32,000 per day.¹⁰ From April 12 through April 19, the seven-day moving average dropped to 27,396, before rising again to 30,178 on April 26. Thereafter, the United States experienced a sustained decrease of confirmed cases, reducing the seven-day moving average to 19,912 on May 30. However, between May 30 and July 24, the seven-day moving average rose sharply to its peak of 66,960 new COVID-19 cases per day. While the number of confirmed positive cases per day is currently trending downwards, the United States is still seeing approximately 42,000 confirmed new cases *per day*.

I also take administrative notice of the information, guidance and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States Government.¹¹ The CDC recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, and social distancing. The CDC further states that the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes.¹² To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."¹³

ii. *The COVID-19 Pandemic in the Commonwealth of Pennsylvania.*

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Pennsylvania imposed strict guidelines early in the pandemic. In March, Pennsylvania issued a Proclamation of Disaster Emergency, directed the closure of all non-life sustaining businesses, and ultimately issued a statewide Stay-at-Home order.¹⁴

On April 20, Pennsylvania Governor Tom Wolf announced a plan for the phased reopening and easing of restrictions using a system of colored phases – red, yellow, and green – to apply to

⁹ *Coronavirus in the U.S.: Latest Map and Case Counts*, NEW YORK TIMES, June 23, 2020 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

¹⁰ <https://www.cdc.gov/covid-data-tracker/#trends>

¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> .

¹² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself> .

¹³ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

¹⁴ The first Stay-at-Home Order issued on March 23 and was based upon community-specific incidence of positive testing.

individual counties as they reached milestones in lowering their incidence of positive cases.¹⁵ To date, all Pennsylvania counties have moved into the “green phase” of reopening. Under that phase, all businesses must continue to adhere to both CDC and Pennsylvania Department of Health guidance. Public health experts continue to advise individuals to avoid unnecessary social contact and to conduct business remotely when possible in order to avoid spikes in cases in the coming weeks.¹⁶ Social gatherings indoor are still restricted to 25 people or less.

Pennsylvania currently ranks twelfth in the nation in confirmed COVID-19 cases with 128,429 cases and 7,576 deaths.¹⁷ Luzerne County, where the Employer’s facility is located, has accounted for 3,597 of those confirmed cases and 186 of those deaths.¹⁸ The Commonwealth, like the country as a whole, has experienced severe swings in confirmed case trends. More recently, on July 23, the Commonwealth experienced 1,182 new COVID-19 cases.¹⁹ By August 2, that figure decreased to 579 new cases, and then spiked again to 1,039 new cases on August 12. *Id.*

Although Pennsylvania has decreased its rate of new cases from its peak in April, there is continued concern about the transmission of the virus. As of August 24, travelers returning to Pennsylvania from 16 states with “high amounts of COVID-19 cases” are advised to quarantine for 14 days upon return.²⁰ In addition, a confirmed positive COVID-19 case in Hanover Area School District, where the Employer’s facility is located, caused the school district to issue an August 10 positive-case notice and required it to fully suspend extracurricular school activities for 14 days. Further, on July 22, all Luzerne County facilities were closed due to two employees and a judge becoming infected with the coronavirus, and numerous county officials were required to enter quarantine for 14 days pending test results.²¹

b. Position of the Parties

Both parties urge that I direct a manual election to be conducted at the Employer’s facility, with the stipulation that the election be converted to a mail-ballot election should at least two employees contract COVID-19 or be forced into quarantine due to possible exposure. The Employer has been operating throughout the pandemic, and no employees have yet tested positive

¹⁵ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

¹⁶ Joel Achenbach, *Coronavirus hot spots erupt across the country; experts warn of second wave in South*, WASHINGTON POST, May 20, 2020, https://www.washingtonpost.com/health/coronavirus-hot-spots-erupt-across-the-country-experts-warn-of-possible-outbreaks-in-south/2020/05/20/49bc6d10-9ab4-11ea-a282-386f56d579e6_story.html.

¹⁷ <https://www.cdc.gov/covid-data-tracker/#cases>. That same data reveals that Pennsylvania has recorded the fifth-highest number of deaths related to COVID-19.

¹⁸ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>

¹⁹ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>

²⁰ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Travelers.aspx>

²¹ <https://www.timesleader.com/news/792855/luzerne-county-court-system-shutting-down-due-to-coronavirus>

for COVID-19. According to the Employer, it has aggressively been implementing recommended and in-force workplace safety guidelines to combat the transmission of the virus, and argues that it can meet each and every guideline suggested by the General Counsel in his recent memorandum regarding conducting manual elections amidst the current pandemic.²²

Based on policies and protocols implemented by the Employer, if an employee is suspected of having COVID-19, the employee is required to leave work, visit the doctor, and not return to work until receiving an all-clear from the doctor. Employees are not temperature-screened daily; however, all visitors receive a temperature check prior to being allowed to access the facility.²³ It is proposed that the election be conducted in the “cage” area of the facility, which, according to images in the record, the parties believe allows for proper social distancing. The parties propose the use of all proper personal protective equipment to ensure compliance with government regulation of indoor spaces, and they promise to ensure proper social distancing.

c. Agency Directive and Legal Authority

Section 11301.2 of the Board’s Casehandling Manual (Representation) provides, in part:

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual Section sets forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are “scattered,” either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section states that “[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director,” citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that the regional director may use discretion to order a mail ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the regional director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *ibid*.

²² [Suggested Manual Election Protocols](#), General Counsel Memorandum 20-10

²³ The record does not reflect the nature of the Employer’s specific temperature screening protocol, i.e. how elevated a temperature someone must register to be denied access to the facility, or whether someone is denied entry to the facility if they register a generally recognized fever of 100.4 degrees.

On April 17, 2020, the Board issued an announcement regarding the COVID-19 pandemic titled “COVID-19 Operational Status,” which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

The Board has already applied the guidelines in *San Diego Gas & Electric* to the extraordinary circumstances created by the COVID-19 pandemic in numerous unpublished Orders, including on May 8 in *Atlas Pacific Engineering Company*, Case 27-RC-258742. There, the Regional Director in Region 27 directed a mail-ballot election notwithstanding the employer’s argument that a manual election could be safely conducted among engineering employees at its facility. The Board stated that in determining whether the COVID-19 pandemic constituted an extraordinary circumstance, the Regional Director properly considered the detailed plan for conducting a manual election in a safe manner proposed by the Employer. The Board then denied the employer’s request for review of the Regional Director’s Decision and Direction of Election, stating:

[i]n finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.²⁴

On July 6, the General Counsel for the NLRB issued guidance on manual elections being conducted during this pandemic. In his memorandum, the General Counsel provides suggested manual election protocols for conducting manual elections in this current environment. Importantly, the General Counsel reaffirmed on multiple occasions in his four-page memorandum that Regional Directors have authority delegated by the Board to make initial decisions about

²⁴ *Atlas Pacific Engineering Company*, 27-RC-258742, at fn. 1 (May 8, 2020); see also *XPO Cartage, Inc.*, 370 NLRB No. 10, slip op. at 1 (2020), where the Board, in upholding an administrative law judge’s decision to order a videoconference trial, stated that “accommodations driven by the worst public health crisis in the last century are more than mere convenience, and the Respondent has failed to establish that the Board should not construe the pandemic as a compelling circumstance.”

when, how, and in what manner all elections are conducted. According to the General Counsel, Regional Directors:

have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

d. Analysis

The COVID-19 pandemic necessitates holding a mail-ballot election in this case. The circumstances surrounding the COVID-19 virus are nothing but extraordinary. Like the rest of the United States, Pennsylvania has been strongly affected by the virus, and while the confirmed cases appear to have slowed, each day continues to bring more cases and deaths, and more uncertainty. Given the extraordinary circumstances caused by the COVID-19 pandemic that still exist in Pennsylvania and elsewhere in the United States, I find it appropriate to exercise my discretion to direct a mail ballot election. That decision is soundly supported by Board law, including *Atlas Pacific Engineering Company*.

The Employer relies on Luzerne County being in the “green phase” of the Commonwealth’s economic re-opening to argue that a manual election here is appropriate. Further, the Employer contends that with the low number of voters in this case and the ample space provided by the Employer’s facility, this election can be conducted safely with adherence to all social distancing guidelines, all personal protective equipment guidelines, and the guidelines described in GC Memo 20-10. While the Petitioner does not explicitly make the same arguments, the record is clear that it joins in the Employer’s position that a manual election is appropriate. I find the parties’ arguments unavailing, and the proposed election procedures ineffective in alleviating the significant health risks of holding this election manually.

At the outset, I note that the General Counsel’s “Suggested Manual Election Protocols” provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate. It is not a checklist whereby a party is entitled to a manual election if it can meet these requirements. As the General Counsel states multiple times in his Memorandum, the manner of election is a question of discretion delegated by the Board to regional directors. In view of the COVID-19 pandemic and the continued spread throughout the Commonwealth of Pennsylvania, and with support from extant Board law, I am directing a mail ballot election.

Moreover, while the daily numbers of new confirmed cases in Pennsylvania are currently below the peak level, the trends of the pandemic have been nothing if not reliably dynamic. Throughout this pandemic, case trends have projected both upwards and downwards at various times. Importantly, over the course of the past five months, a spike in cases routinely followed a downtrend trend in new cases. While we cannot know for sure whether the recent decline in new confirmed cases will continue, or whether another spike will occur, the data undeniably highlights

the inherent difficulties in projecting future case trends. As a manual election in this case will not be scheduled for several weeks following the issuance of this decision, projecting whether the case trends will warrant a manual election at that time is impracticable.

Recent events underscore the unpredictable nature of this pandemic. In the span of three weeks, new cases in the Commonwealth declined from 1,182 on July 23 to 579 on August 2, only to spike again and return to 1,039 new cases on August 12. Moreover, there is very clearly COVID-19 in the area of the Employer's facility, and the impact is significant. On July 22, Luzerne County facilities were forced to close due to the transmission of the virus among County employees, and many others were forced to enter a 14-day quarantine. Additionally, the local school district was forced to suspend all extra-curricular school activities for 14 days due to possible spread of the virus in the school district. While some may argue that these are isolated incidents, or that the data indicates a downward trend in new cases, the incidents emphasize how quickly this pandemic can disrupt daily life and activities. At any moment an employee eligible to vote in this election may contract COVID-19 or have contact with someone who did, and so be forced into quarantine and be prevented from voting in a manual election. There is, therefore, no guarantee that a manual election can be safely conducted in this case in the near future. The conduct of this election by mail ballot has the benefit of eliminating the uncertainty that a manual election could be delayed.

I have considered the accommodations and arrangements offered by the Employer but find that they are inadequate under the circumstances. Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer's facility. All but the voters would need to gather for approximately 30 minutes for the pre-election conferences, including the check of the voter list and the parties' inspection of the voting areas. The Board agent and observers would share a voting area for the duration of the proposed manual election, a sufficient amount of time to risk exposure to the virus. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, for instance in the case of a challenged ballot where the Board Agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange and pass the required envelopes, and initial the appropriate section of the challenge envelope. See Casehandling Manual Section 11338.3. At the conclusion, the agent would count the ballots, typically in the same voting area, with the observers, party representatives, and other employees who wish to attend.

There is also a significant risk of voter disenfranchisement for any voter who (1) is diagnosed with COVID-19 immediately preceding the election, (2) is required to self-quarantine based on contact tracing, or (3) shows up to the election with a temperature and cannot pass the Employer's temperature screening. Under the Employer's procedures for accessing the plant, on the day of the election, if employees fail the temperature screen, they would be denied access and be unable to vote. Even more, should the Board agent tasked with conducting the election fail the temperature screen, the election would necessarily be cancelled. On the other hand, these screening procedures are not infallible and may result in a COVID-infected employee, particularly

those that are asymptomatic, entering the facility. These scenarios may not only result in voter disenfranchisement, but also the potential transmission of the virus by asymptomatic employees or ill employees without a fever. All of the substantial risks outlined above are eliminated by use of the Board's mail-ballot procedures.

Lastly, I find unworkable the parties proffered plan to convert a manual election to a mail ballot election should at least two employees test positive for COVID-19 or be forced into quarantine. There is currently no anticipated testing regimen that will allow for rapid test results such that testing would allow the parties, and the Region, to assess whether any employees are COVID-19-positive at any given time. Tests results take time, and there is ample evidence that the same individual can test both negative and positive within days of each test. Both types of elections require substantial planning and time such that it is impracticable to simply switch from a manual election to a mail election at a moment's notice. Notices of Election will issue with this decision to inform eligible voters of the mechanics of the election; switching the voting method prior to an election could lead to confusion among voters and the potential for further disenfranchisement. The uncertainties inherently present in this proposed plan are entirely mitigated by directing a mail-ballot election at the outset.

To alleviate the significant health risks associated with conducting manual elections at this stage of the pandemic, I find that the most responsible measure to ensure a safe election is by conducting mail-ballot election. Mail ballots will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, their families, and the public to COVID-19, and it will ensure that the employees in the unit herein will have the opportunity to vote promptly. While long-standing Board policy favors manual elections, mail-ballot elections continue to be an often-utilized voting method and continue to have their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that International Brotherhood of Teamsters Local 401 is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees in this election, there is no contract bar or other bar to an election in this case, and there is no collective bargaining history for the employee herein.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time packers, operators, and forklift operators employed by the Employer at its Sugar Notch, Pennsylvania facility.

Excluding: All other employees, office clerical employees, confidential employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters Local 401.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on **Monday, August 31, 2020**. Voters must return their mail ballots so that they will be received by close of business on **Monday, September 28, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

The mail ballots will be commingled and counted on **Monday, October 5, 2020** at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date. In order to be valid and counted, the returned ballots must be received by the Region Four office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Election Clerk Ed Canavan at (215) 597-7618 no later than 5:00 p.m. on **Monday, September 14, 2020** in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending August 16, 2020 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Acting Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Acting Regional Director and the parties by Wednesday, August 26, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue and that accompany this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice and the ballots will be published in the following languages: English, Spanish. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Acting Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 24, 2020



HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board